Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

(10)

No. 03-6821

IN THE

# Supreme Court of the United States

---

DAVID NELSON,

*Petitioner*,

v.

DONAL CAMPBELL, Commissioner, Alabama Department of Corrections, *et al.*,

*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## BRIEF OF SENATOR ORRIN G. HATCH AND CONGRESSMAN TOM DeLAY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

---

ED R. HADEN *
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201-0306
(205) 251-8100

* Counsel of Record

Counsel for *Amici Curiae*

March 3, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| STATEMENT OF INTEREST OF *AMICI CURIAE* | 1 |
| INTRODUCTION | 2 |
| SUMMARY OF THE ARGUMENT | 7 |
| ARGUMENT | 8 |
| I. PURSUANT TO ITS CONSTITUTIONAL POWER, CONGRESS ENACTED AEDPA TO REDUCE DELAYS IN CARRYING OUT SENTENCES CAUSED BY THE FILING OF MULTIPLE CLAIMS IN THE LOWER FEDERAL COURTS REGARDLESS OF HOW SUCH CLAIMS ARE LABELED | 8 |
| A. "Justice Delayed is Justice Denied." | 10 |
| B. Prior to AEDPA, Challenges to Sentences Were Subject to Habeas Limitations Whether Such Challenges Were Labeled "§ 1983" or "Habeas." | 13 |
| II. CONGRESS EXERCISED ITS CONSTITUTIONAL POWER TO PROHIBIT THE LOWER FEDERAL COURTS FROM GRANTING RELIEF TO STATE INMATES BASED ON "NEW FACTS" THAT DO NOT RELATE TO ACTUAL INNOCENCE | 16 |
| A. Congress Intended to Limit Relief Based on "New Facts" Claims That Do Not Relate to Actual Innocence | 17 |
| B. Allowing State Inmates to Evade Congress' Limitation on Successive Challenges to Sentences Based on Labels Would Undermine Congress' Constitutional Power | 19 |
| CONCLUSION | 20 |

# TABLE OF AUTHORITIES

CASES — Page

*Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) ..... 15
*Barefoot v. Estelle*, 463 U.S. 880 (1983) ..... 9, 10
*Bilik v. Strassheim*, 212 U.S. 551 (1908) ..... 9
*Calderon v. Thompson*, 523 U.S. 538 (1998) ..... 18
*Carafas v. La Vallee*, 391 U.S. 234 (1968) ..... 9
*Davis v. Jacobs*, 454 U.S. 911 (1981) ..... 9
*Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) .... 18
*Ex parte Patrick*, 212 U.S. 555 (1908) ..... 9
*Felker v. Turpin*, 518 U.S. 1047 (1996) ..... 1, 18, 19
*Garrison v. Patterson*, 391 U.S. 464 (1968) ..... 9
*Gomez v. United States Dist. Court*, 503 U.S. 653 (1992) ..... 14, 19
*House v. Mayo*, 324 U.S. 42 (1945) ..... 9
*In re Jugiro*, 140 U.S. 291 (1891) ..... 9
*Jeffries v. Barksdale*, 453 U.S. 914 (1981) ..... 9
*Lambert v. Barrett*, 159 U.S. 660 (1895) ..... 9
*Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938) ... 8
*Lonchar v. Thomas*, 517 U.S. 314 (1996) ..... 14, 15, 16, 18, 19
*McCleskey v. Zant*, 499 U.S. 467 (1991) ..... 14
*Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) .. 14
*Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) ..... 8
*National Org. for Women v. Idaho*, 455 U.S. 918 (1982) ..... 1
*Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1573 (2003) ..... 4, 5, 19
*Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993) .. 4, 19
*Nelson v. State*, 278 So. 2d 734 (Ala. Crim. App. 1973) ..... 3
*Nelson v. State*, 405 So. 2d 392 (Ala. Crim. App. 1980), *rev'd*, 405 So. 2d 401 (Ala. 1981) ..... 3



# TABLE OF AUTHORITIES—Continued

Page

*Nelson v. State*, 405 So. 2d 50 (Ala. Crim. App. 1981) ..... 4
*Nelson v. State*, 452 So. 2d 1367 (Ala. Crim. App.), *cert. denied*, 452 So. 2d 1367 (Ala. 1984) ..... 3
*Nelson v. State*, 511 So. 2d 225 (Ala. Crim. App. 1986), *aff'd*, 511 So. 2d 248 (Ala. 1987), *cert. denied*, 486 U.S. 1017 (1988) ..... 3, 4
*Nelson v. State*, 681 So. 2d 252 (Ala. Crim. App. 1995) ..... 4
*Nelson v. State*, 681 So. 2d 257 (Ala. Crim. App.), *aff'd*, 681 So. 2d 260 (Ala. 1996) ..... 4
*Nowakowski v. Maroney*, 386 U.S. 542 (1967) ..... 9
*Preiser v. Rodriguez*, 411 U.S. 475 (1973) ..... 13, 14, 19
*Rogers v. Peck*, 199 U.S. 425 (1905) ..... 9
*United States v. Helstoski*, 442 U.S. 477 (1979) ... 1
*United States v. Payner*, 447 U.S. 727, 736 (1980) ..... 15

CONSTITUTIONAL PROVISION

United States Constitution art. III, § 1 ..... 8

STATUTES AND RULE

28 U.S.C. § 1257 ..... 18
28 U.S.C. § 1341 ..... 8
28 U.S.C. § 1915 ..... 9
28 U.S.C. § 2244 ..... 1, 17, 18, 19, 20
28 U.S.C. § 2253 ..... 9
28 U.S.C. § 2254 ..... i
29 U.S.C. §§ 101–110, 113–115 ..... 8
42 U.S.C. § 1983 ..... *passim*
Antiterorism and Effective Death Penaty Act of 1996, 110 Stat. 1214 ..... *passim*

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. § 766 (2d ed. 1878)) | 9 |
| Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940 | 9 |
| Act of Mar. 10, 1908, ch. 76, 35 Stat. 40 | 9 |
| 725 Illinois Comp. Stat. Ann. 5/119-5(a)(1) (2002) | 4 |
| Ala. Code § 15-18-82.1 (West Supp. 2003) | 4, 5 |
| Ariz. Rev. Stat. Ann. § 13-704 (Rev. 2001) | 4 |
| Ark. Code Ann. § 5-4-617 (1997) | 4 |
| Cal. Penal Code 53604 (2000) | 4 |
| Colo. Rev. Stat. Ann. § 18-1.3-1202 (West Supp. 2003) | 4 |
| Conn. Gen. Stat. § 54-100 (2001) | 4 |
| Del. Code Ann. tit. 11, § 4209(f) (2001) | 4 |
| Fla. Stat. Ann. § 922.105 (2001) | 4 |
| Ga. Code Ann., § 17-10-38 (Supp. 2003) | 4 |
| Idaho Code § 19-2716 (1997) | 4 |
| Ind. Code Ann. § 35-38-6-1 (1998) | 4 |
| Kan. Stat. Ann. § 22-4001 (Supp. 2002) | 4 |
| Ky. Rev. Stat. Ann. § 431.220 (2000) | 4 |
| La. Rev. Stat. Ann. § 15:569 B (1992) | 4 |
| Md. Code Ann., Corr. Servs. § 3-905 (1999) | 4 |
| Miss. Code Ann. 99-19-51 (Rev. 2000) | 4 |
| Mo. Rev. Stat. § 546.720 (2002) | 4 |
| Mont. Code Ann. § 46-19-103 (2003) | 4 |
| Nev. Rev. Stat. § 176.355(1) (2001) | 4 |
| N.H. Rev. Stat. Ann. § 630:5 XIII. (1996) | 4 |
| N.J. Stat. Ann. § 2C:49-2 (1995) | 4 |
| N.M. Stat. Ann. § 31-14-11 (2000) | 4 |
| N.Y. Correct. Law § 658 (2003) | 4 |
| N.C. Gen. Stat. § 15-187 (2003) | 4 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Ohio Rev. Code Ann. § 2949.22 (West 1997) | 4 |
| Okla. Stat. Ann. tit. 22, § 1014 (2003) | 4 |
| Or. Rev. Stat. § 137.473, amended by 2003 Or. Laws 103 (1999) | 4 |
| Pa. Stat. Ann. tit. 61, § 3004 (1999) | 4 |
| S.C. Code Ann. § 24-3-530 (Supp. 2003) | 5 |
| S.D. Codified Laws § 23A-27A-32 (1998) | 5 |
| Tenn. Code Ann. § 40-23-114 (2003) | 5 |
| Tex. Crim. Proc. Code Ann. § 43.14 (1979) | 5 |
| Utah Code Ann. § 77-18-5.5 (2003) | 5 |
| Va. Code Ann. § 53.1-233 (2003) | 5 |
| Wash. Rev. Code Ann. § 10.95.180 (2002) | 5 |
| Wyo. Stat. Ann. § 7-13-904 (2003) | 5 |
| Supreme Court Rule 37 | 1 |

LEGISLATIVE HISTORY AND PRESIDENTIAL STATEMENTS

| | |
|---|---|
| 42 Cong. Rec. 608-09 (1908) | 9 |
| 141 Cong. Rec. S7821 (June 7, 1995) | 12 |
| 141 Cong. Rec. S7833 (June 7, 1995) | 13 |
| 142 Cong. Rec. H2248 (Mar. 14, 1996) | 12 |
| 142 Cong. Rec. S3352 (April 16, 1996) | 11 |
| 142 Cong. Rec. S3359 (Apr. 16, 1996) | 13 |
| 142 Cong. Rec. S3379 (April 16, 1996) | 17 |
| *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) | 10 |

TABLE OF AUTHORITIES—Continued

Page

*Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Senate Comm. on the Judiciary*, 101st Cong., 2nd Sess. (1990) ..... 11

*Federal Criminal Law Revision, Parts 2 & 3: Hearings on H.R. 1647, et al., Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 1st and 2nd Sess. (1981 & 1982) ..... 10

*Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) ..... 11, 12

*Federal Habeas Corpus: Hearing Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2nd Sess. (1978) ..... 10

*Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) ..... 10

H.R. Rep. No. 23, 60th Cong., 1st Sess. 1-2 (1908) ..... 9

H.R. Rep. No. 308, 80th Cong., 1st Sess. A179-A80 (1947) ..... 9

*Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991) ..... 11



TABLE OF AUTHORITIES—Continued

Page

*Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101 Cong., 2 Sess. (1990) ..... 10, 11

*Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) ..... 10

*Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) ..... 10

*Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S.* 1760 Before the Senate Comm. on the Judiciary, 101st Cong., 1st and 2nd Sess. 8 (1989 & 1990) ..... 10

*Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st & 2nd Sess. (1993 & 1994) ..... 11

*Habeas Corpus: Hearings on S. 1314 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. (1976) ..... 10

*Innocence and the Death Penalty: Hearings on S. 221 Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) ..... 11

*Race Claims and Federal Habeas Corpus: Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991) .... 11

TABLE OF AUTHORITIES—Continued

Page

*The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. (1982)..... 10
*Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the Senate Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991).... 11
*Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 Weekly Comp. Pres. Doc. 717 (Apr. 24, 1996)..... 16
*Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 Weekly Comp. Pres. Doc. 719 (Apr. 24, 1996)..... 16, 17

OTHER AUTHORITIES

Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699 (2002)..... 6, 18
Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984)..... 8
Historical and Revision Notes Following 28 U.S.C. § 2253 ..... 9
N.B. Meland et al., *Saphenofemoral Venous Cutdowns in the Premature Infant*, 21 J. of Pediatric Surgery 341 (1986).....5, 6, 20
Paul Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030 (1982)..... 8



TABLE OF AUTHORITIES—Continued

Page

Report of the President's Comm'n on the Assassination of President Kennedy, Appendix 8: Medical Reports from Doctors at Parkland Memorial Hospital, Dallas, Tex. p. 529 (Statement of M.T. Jenkins, M.D.)..... 6, 20
S. Dronen & P. Lanter, *Venous Cutdown, in* Clinical Procedures In Emergency Medicine 350 (J. Roberts & J. Hedges eds., 3d ed. 1998)..... 6, 20
Samuel Eric Wilson, *Cutdown Techniques*, in Vascular Access: Principles And Practice 251-52 (4th ed. 2002)..... 5, 20

## STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

This case raises important questions regarding the constitutional power of Congress to limit the jurisdiction of the lower federal courts to grant relief on second or successive habeas corpus petitions. *Amicus* Senator Orrin Hatch was the primary sponsor of the habeas corpus bill in the Senate and served as Chairman of the Senate Committee on the Judiciary, the committee that had jurisdiction over the bill that became the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). He and the other *amicus* are vitally interested in seeing that AEDPA remains an effective bar to second or successive challenges to sentences. Members of Congress have participated as *amici curiae* in cases of special significance involving important issues affecting the legislative branch, including AEDPA's successive-petitions provisions, both by consent and on motion. *E.g., Felker v. Turpin*, 518 U.S. 1047 (1996); *National Org. for Women v. Idaho*, 455 U.S. 918 (1982); *United States v. Helstoski*, 442 U.S. 477 (1979).

*Amici* have an institutional interest in the proper application of AEDPA's finality requirements, which have been codified in 28 U.S.C. § 2244(b). Congress designed those requirements to ensure that, absent a showing of actual innocence, the lower federal courts will not have jurisdiction, or power, to grant relief over second or successive challenges to sentences based on "new facts." By merely labeling a successive challenge to his sentence—a challenge that does not allege actual innocence—a "42 U.S.C. § 1983

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was prepared in its entirety by *amici* and its counsel. No monetary contribution was made by any person other than *amici* and its counsel. Pursuant to Supreme Court Rule 37.3(a), *amici* have conferred with the parties regarding the filing of this brief *amici curiae*, and both parties have consented to its filing. Evidence of the written consent of the parties has been filed separately herewith.

claim" instead of a "habeas petition," Petitioner seeks to avoid AEDPA's bar on second or successive challenges to sentences.

Were the Court to grant such relief, it would undermine Congress' constitutional power to prescribe the jurisdiction of the lower federal courts with respect to challenges to sentences by making that power yield to the choice of prisoners as to how they label their challenges—"§ 1983" or "habeas." It is in the institutional interest of *amici* as Members of Congress to represent their views on this important issue for the Court's independent consideration.

## INTRODUCTION

*Amici* agree with the Statement of Facts in Respondents' brief and provide only this overview of the facts and procedural history to highlight the concerns addressed in this brief.

After his release from a prison sentence for murdering Oliver King during a robbery, David Larry Nelson, a white male, murdered James Cash after stealing $20 from him, murdered Wilson Thompson, before stealing his car, and attempted to murder his fourth victim, Linda Vice, before stealing her purse. New Year's Eve, December 31, 1977, began with convicted murderer, Nelson, entering a cab with a gun—a .38 caliber pistol—and a girl—Linda Vice. At the end of the ride, Nelson stuck out his pistol, took $20 from cab driver Cash, and demanded his watch. When the independent Cash refused and grabbed the pistol, Nelson shot him in the chest and shot him again in the head, murdering him. Nelson then made his way, with Linda, to a bar. Nelson met Thompson and offered him an "orgy" with Linda if Thompson would take them to his home in his car. Arriving at 2:00 a.m., Nelson snapped at Linda to "take something off" and invited Thompson, now naked, to perform oral sex on her. As Thompson began, Nelson placed the pistol at the back of Thompson's neck and fired, murdering him. The bullet



passed through Thompson's neck and spinal cord and hit Linda's leg, causing her to scream. Nelson fired the pistol again, hitting Linda in the wrist, and fired again, grazing her head. Looking down at the bloody, terrified woman, Nelson "displayed his penis and tried to get Vice to perform oral sex upon him."

Bloody, naked, terrified, Linda fled to a nearby house where a woman took her in. A fist banged on the door. The women did not answer. They called the police, but being New Year's Eve, the police were slow to respond. The fist banged on the door for almost two hours. Finally, Nelson drove off in Thompson's car with Linda's purse. The next day, a deputy sheriff in Tennessee captured Nelson in Thompson's car with the pistol.[2]

Nelson pleaded guilty to his first murder, the murder of Oliver King, in 1974 and served a prison term.[3] Two juries convicted Nelson of his second murder, the murder of James Cash; the first sentenced him to death and the second to life in prison, with judicial approval.[4]

A jury convicted Nelson of his third murder, the January 1, 1978, murder of Wilson Thompson, which is at issue in this case, and he received a capital sentence. This murder was a capital crime because it was committed within twenty years of Nelson's conviction for the murder of Oliver King. After twenty-five years and numerous judicial proceedings, includ-

---

[2] *Nelson v. State*, 511 So. 2d 225, 229-30 (Ala. Crim. App. 1986), *aff'd*, 511 So. 2d 248 (Ala. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Nelson v. State*, 405 So. 2d 392, 396 (Ala. Crim. App. 1980), *rev'd*, 405 So. 2d 401 (Ala. 1981); *Nelson v. State*, 278 So. 2d 734, 735 (Ala. Crim. App. 1973).

[3] *Nelson*, 511 So. 2d at 228.

[4] *Nelson*, 405 So. 2d 392, *rev'd*, 405 So. 2d 401, *on remand*, 405 So. 2d 401 (Ala. Crim. App. 1981); *Nelson v. State*, 452 So. 2d 1367 (Ala. Crim. App.), *cert. denied*, 452 So. 2d 1367 (Ala. 1984).

ing two convictions by juries, three sentences by juries, four sentencing hearings by judges, six reviews by state appellate courts, and six reviews by federal courts (including two habeas petitions—one in 1990 and one in 1997) Nelson's conviction and capital sentence became final for purposes of direct and collateral review on March 24, 2003, when this Court denied certiorari.[5]

Nelson does not argue that he is actually innocent. App. 70. He is represented by a team of lawyers, including leading anti-death penalty activist and capital defense lawyer Bryan Stevenson.

In July 2002, the State of Alabama joined over thirty other States in adopting lethal injection as a humane means of execution.[6] Alabama law allows death row inmates to choose

[5] *Nelson v. State*, 405 So. 2d 50 (Ala. Crim. App. 1981); *Nelson*, 511 So. 2d 225, *aff'd*, 511 So. 2d 248, *cert. denied*, 486 U.S. 1017; *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993); *Nelson v. State*, 681 So. 2d 252 (Ala. Crim. App. 1995); *Nelson v. State*, 681 So. 2d 257 (Ala. Crim. App.), *aff'd*, 681 So. 2d 260 (Ala. 1996); *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1573 (2003).

[6] Lethal injection is used by 37 of the 38 States that have capital punishment. *See* Ala. Code 1975 § 15-18-82.1 (West Supp. 2003); Ariz. Rev. Stat. Ann. § 13-704 (Rev. 2001); Ark. Code Ann. § 5-4-617 (1997); Cal. Penal Code § 3604 (2000); Colo. Rev. Stat. Ann. § 18-1.3-1202 (West Supp. 2003); Conn. Gen. Stat. § 54-100 (2001); Del. Code Ann. tit. 11, § 4209(f) (2001); Fla. Stat. Ann. § 922.105 (2001); Ga. Code Ann., § 17-10-38 (Supp. 2003); Idaho Code § 19-2716 (1997); 725 Ill. Comp. Stat. Ann. 5/119-5(a)(1) (2002); Ind. Code Ann. § 35-38-6-1 (1998); Kan. Stat. Ann. § 22-4001 (Supp. 2002); Ky. Rev. Stat. Ann. § 431.220 (2000); La. Rev. Stat. Ann. § 15:569 B (1992); Md. Code Ann., Corr. Servs. § 3-905 (1999); Miss. Code Ann. 99-19-51 (Rev. 2000); Mo. Rev. Stat. § 546.720 (2002); Mont. Code Ann. § 46-19-103 (2003); Nev. Rev. Stat. § 176.355(1) (2001); N.H. Rev. Stat. Ann. § 630:5 XIII. (1996); N.J. Stat. Ann. § 2C:49-2 (1995); N.M. Stat. Ann. § 31-14-11 (2000); N.Y. Correct. Law § 658 (2003); N.C. Gen. Stat. § 15-187 (2003); Ohio Rev. Code Ann. § 2949.22 (1997); Okla. Stat. Ann. tit. 22, § 1014 (2003); Or. Rev. Stat. § 137.473, amended by 2003 Or. Laws 103 (1999); Pa. Stat. Ann. tit. 61, § 3004 (1999); S.C. Code Ann. § 24-3-530 (Supp. 2003); S.D. Codified Laws § 23A-27A-32 (1998); Tenn. Code Ann. § 40-23-114 (2003); Tex. Crim. Proc. Code Ann. § 43.14 (1979); Utah Code Ann. § 77-18-5.5 (2003); Va. Code Ann. § 53.1-233 (2003); Wash. Rev. Code Ann. § 10.95.180 (2002); and Wyo. Stat. Ann. § 7-13-904 (2003).



electrocution or lethal injection.[7] Nelson is a long-time intravenous drug user who has had difficulty over the last two decades receiving injections into the severely compromised veins in his lower arms. App. 7, 106. With this knowledge and his extensive and recognized experience at participating in his multiple capital trials,[8] Nelson chose, by default, lethal injection as the method for his execution. He made no challenge to the method of lethal injection in July 2002.

For decades, accepted medical practice to effect an injection for general purposes was to try first to insert a needle into a vein in the patient's arm, leg, or neck. If that was unsuccessful, local anesthetic would be applied to one of these or other areas, and a one- to two-inch incision would be made to expose a vein into which a catheter could be inserted. The textbook anesthetized incision method, often called a "cutdown," is used on newborn infants and trauma patients.[9]

[7] Ala. Code § 15-18-82.1.

[8] *Nelson*, 292 F.3d at 1298 (discussing Nelson's "extensive experience in criminal trials").

[9] *See* Samuel Eric Wilson, *Cutdown Techniques* in Vascular Access: Principles and Practice 251-52 (4th ed. 2002) [hereinafter Vascular Access: Principles and Practice] ("*External Jugular Vein* . . . After the appropriate injection of local anesthetic agent, a 1- to 2-cm incision is made transversely over the visible external jugular vein, approximately 1 to 3 cm above the clavicle . . . *Internal Jugular Vein* . . . A 3- to 4-cm incision is made here, approximately 2 cm above the clavicle. . . .*Cephalic Vein* . . . The usual location for the cephalic [upper arm] vein cutdown is in the deltopectoral groove. . . . *Saphenous Vein* . . . For placement of a central long-term venous access catheter or port via the lower extremity, a saphenous [leg] vein cutdown near the groin is performed."); N.B. Meland et al., *Saphenofemoral Venous Cutdowns in the Premature Infant*, 21 J. of Pediatric Surgery 341, 343 (1986) [hereinafter Journal of Pediatric

This "time-honored, simple surgical technique," in fact, was used on President Kennedy forty years before Nelson's scheduled execution in 2003.[10]

Fifteen months after choosing the lethal injection method, Nelson's counsel filed a challenge to the means of execution in federal district court just three days before Nelson's scheduled execution. Nelson's counsel argued that the possibility of an anesthetized incision—or "cutdown"—procedure, if a leg or neck injection could not be performed, would violate Nelson's civil right against cruel and unusual punishment. He sought a stay of execution and a different injection procedure. Nelson's lawyers, one of whom has written that AEDPA bars a challenge to the means of execution after an inmate's first habeas petition has been denied,[11] have labeled the challenge a "§ 1983 action," instead of a "habeas petition." The district court and the Eleventh Circuit stated that the "§ 1983 claim" was the "functional equivalent" of a habeas petition because it challenged a sentence—execution

---

Surgery] ("This cutdown and access procedure is safe, effective, and cheaper than other central access procedures. . . . The infant can easily be held and fondled by the nurses and parents, since the intravenous lines are in a much less cumbersome position.").

[10] S. Dronen & P. Lanter, *Venous Cutdown, in* Clinical Procedures in Emergency Medicine 350 (J. Roberts & J. Hedges eds., 3d ed. 1998) [hereinafter Clinical Procedures in Emergency Medicine] (stating that a cutdown is a "time-honored, simple sugical technique"); Report of the President's Comm'n on the Assassination of President Kennedy, Appendix 8: Medical Reports from Doctors at Parkland Memorial Hospital, Dallas, Tex. p. 529 (Statement of M.T. Jenkins, M.D.) [hereinafter Warren Commission Report], *available at* http://www. archives. gov/research_room/jfk/warren_commission_report_appendix8.html ("[A] venous cutdown was performed on the right saphenous [leg] vein . . . .").

[11] Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 736-40 (2002).



by injection. App. 110, 121. Because the challenge did not involve new facts showing innocence, both courts held that it was barred by AEDPA. App. 115, 122.

## SUMMARY OF THE ARGUMENT

The Constitution vests in Congress the power to determine what relief the lower federal courts may provide to state prisoners. Leading up to the passage of AEDPA, Congress conducted extensive hearings and determined that undue delays in carrying out capital sentences were occurring under the existing statutes, rules, and precedents governing federal habeas corpus petitions.

Congress was also aware that this Court had held that a prisoner could not avoid limitations on habeas petitions by labeling a challenge to his sentence a "§ 1983 claim." Immediately prior to Congress' passage of AEDPA, this Court stated that Congress should strike the balance between the interests of prisoners, on the one hand, and the interests of States and victims, on the other.

In 1996, Congress struck this balance in AEDPA by limiting the relief that the lower federal courts can provide to state prisoners. AEDPA specifically states that second or successive habeas petitions based on new facts that do not call the prisoner's actual guilt of the crime into question "shall be dismissed." Petitioner's challenge regarding new facts—the new method of execution that he chose in 2002—does not raise any issue concerning his actual guilt regarding his third and capital murder.

This Court should not allow prisoners to use labels (*e.g.*, "§ 1983 complaint") to avoid the express limitation that Congress established on the relief that the lower federal courts may provide to prisoners. Doing so would undermine the constitutional power of Congress and upset the balance of competing interests that Congress struck.

## ARGUMENT

### I. PURSUANT TO ITS CONSTITUTIONAL POWER, CONGRESS ENACTED AEDPA TO REDUCE DELAYS IN CARRYING OUT SENTENCES CAUSED BY THE FILING OF MULTIPLE CLAIMS IN THE LOWER FEDERAL COURTS REGARDLESS OF HOW SUCH CLAIMS ARE LABELED.

The Constitution of the United States vests Congress with the power to establish and determine the jurisdiction of the lower federal courts.[12] Congress has often exercised this

[12] The Constitution of the United States provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish.*"

U.S. Const. art. III, § 1 (emphasis added).

This Court has recognized that Congress may withdraw jurisdiction from the lower federal courts. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976) (stating that Congress' enactment of the Tax Injunction Act, 28 U.S.C. § 1341, deprived federal district courts of the power to enjoin the levy of any tax under state law where a state remedy is available and thus limited their subject matter jurisdiction); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938) (upholding Congress' enactment of the Norris-LaGuardia Act, 29 U.S.C. §§ 101–110, 113–115, which deprived federal courts of jurisdiction to issue injunctions in labor disputes). And commentators have recognized:

> [T]he widely supported conclusion: "The Constitution contains many provisions that are not at all clear. It does, however, contain a few that are clear. One of the clearest is the power of Congress to regulate the jurisdiction of [the lower federal courts]."

Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 912 (1984) (brackets by Gunther) (quoting Paul Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1030 (1982)).



power to expand and contract the jurisdiction, or power, of the lower federal courts to grant relief to prison inmates who challenge their convictions or sentences.[13] After reviewing

[13] In 1908, condemned state prisoners were abusing the then-existing version of the Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. § 766 (2d ed. 1878)), in order to forestall their executions. Section 1 authorized federal courts to review state court judgments and provided that any such judgment would be stayed automatically whenever a state prisoner filed a habeas petition until all federal proceedings had been completed. § 1, 14 Stat. 386. The result was that state prisoners could fend off execution as long as they could file a last minute habeas petition before sentence was carried out. *E.g., Rogers v. Peck*, 199 U.S. 425 (1905); *Lambert v. Barrett*, 159 U.S. 660 (1895); *In re Jugiro*, 140 U.S. 291 (1891). Concerned that condemned state inmates were frustrating the States' ability to enforce their capital sentencing laws, in 1908, Congress revised the Habeas Corpus Act of 1867 in two ways: It eliminated the automatic right to appeal the denial of a habeas petition to this Court, and it imposed the requirement, now found at 28 U.S.C. § 2253, that a prisoner obtain from this Court a certificate of probable cause to appeal. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40; *see* H.R. Rep. No. 23, 60th Cong., 1st Sess. 1-2 (1908); 42 Cong. Rec. 608-09 (1908). A certificate of probable cause thus became a jurisdictional prerequisite for appealing to this Court a circuit court's denial of a state prisoner's habeas petition. *House v. Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908); *Bilik v. Strassheim*, 212 U.S. 551 (1908). In 1925, as part of an overall modification of federal appellate jurisdiction, Congress extended the probable cause requirement to the courts of appeals. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940; *see generally Davis v. Jacobs*, 454 U.S. 911, 916-17 (1981) (opinion of Rehnquist, J.); *Jeffries v. Barksdale*, 453 U.S. 914, 915 (1981) (opinion of Rehnquist, J.). In 1948, Congress retained the probable cause requirement in 28 U.S.C. § 2253 as part of an overall modification of the Judicial Code. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179-A80 (1947); Historical and Revision Notes Following 28 U.S.C. § 2253; *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983); *Garrison v. Patterson*, 391 U.S. 464 (1968); *Carafas v. La Vallee*, 391 U.S. 234 (1968); *Nowakowski v. Maroney*, 386 U.S. 542 (1967). As this Court explained, the probable cause standard of 28 U.S.C. § 2253 "requires something more than the absence of frivolity" and also is "a higher one than the 'good faith' requirement" to proceed in forma pauperis under 28 U.S.C. § 1915." *Barefoot*, 463 U.S. at 893 (citation

the extraordinary delays in carrying out capital sentences and with knowledge of this Court's treatment of challenges to sentences labeled "§ 1983 claims" as subject to the existing limits on habeas corpus relief, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to further limit the power of the lower federal courts to grant relief to state inmates who challenge their sentences.

### A. "Justice Delayed is Justice Denied."

In numerous hearings that spanned three decades, Congress examined the practice of federal courts reviewing state court judgments in capital cases.[14] Because capital litigants and

---

omitted). Instead, "a certificate of probable cause requires a prisoner to make a 'substantial showing of the denial of [a] federal right." *Id.* (citation omitted).

[14] *See, e.g., Habeas Corpus: Hearings on S. 1314 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. (1976); *Federal Habeas Corpus: Hearing Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2nd Sess. (1978); *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. (1982); *Federal Criminal Law Revision, Parts 2 & 3: Hearings on H.R. 1647, et al., Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 1st and 2nd Sess. (1981 & 1982); *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st and 2nd Sess. 8 (1989 & 1990) (hereinafter "1990 Senate Hearings"); *Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st



their counsel have every incentive to delay the carrying out of the sentence by litigating the same issues more than once and by bringing certain issues to the court immediately before execution, Congress discovered numerous examples of extraordinary delays. For example, Chairman Hatch recalled:

> In Utah, we had one case that went 18 years, the ["]hi-fi murderer,["] where he and his buddy went in there, where they tortured these people, rammed pencils through their eardrums, poured Drano down their throats, and murdered them in cold blood. No question of guilt, no question of any prejudice against them, they were convicted and justly sentenced to death.
>
> Mr. President, 18 years later, 28 appeals all the way up through the State courts to the State supreme court, all the way up to the Federal courts to the Federal Supreme Court—28 appeals, millions of dollars spent before that just sentence could be carried out. And that is going on in a myriad of cases all over this country.

142 Cong. Rec. S3352 (April 16, 1996).

---

Cong., 2nd Sess. (1990); *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Senate Comm. on the Judiciary*, 101st Cong., 2nd Sess. (1990); *Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the Senate Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Race Claims and Federal Habeas Corpus: Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Innocence and the Death Penalty: Hearings on S. 221 Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993); *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st & 2nd Sess. (1993 & 1994); *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (hereinafter "1995 Senate Hearing").

Chairman Hyde recounted:

> John Wayne Gacy, Members must be sick of hearing his name, I see his face, because I represented where he lived and where they found 27 bodies buried in his house: 14 years and 52 separate appeals. My God, what an outrage that is.
>
> There are many cases like that. William Bonan, 16 years, guilt never in doubt; Kermit Smith, 14 years. From the time he was sentenced until he was executed, 46 different judges considered his case, and it went to the Supreme Court five different times.

142 Cong. Rec. H2248 (Mar. 14, 1996).

Senator Specter observed:

> In a context where the delays average 9 years, and in some cases go on as long as 20 years, the death penalty, which should be the flagship of the criminal justice system, has become the laughingstock of the criminal justice system, and criminals get the impression—regrettably, the accurate impression—that the law will not be carried out.

1995 Senate Hearing 7.

Senator Nickles observed:

> [S]ince his convictions, Roger Dale Stafford has made at least 18 reported appearances in Federal and State courts. He has been before the U.S. Supreme Court six times—1985, 1985, 1985, 1984, 1984, 1984—before the U.S. Court of Appeals for the 10th Circuit once, 1994, before the Oklahoma Supreme Court once, 1986, and before the Oklahoma Court of Criminal Appeals nine times, 1993, 1992, 1991, 1990, 1987, 1985, 1985, 1983, 1983. This list does not include appearances which were not officially reported. It omits one pretrial appearance at an appellate court, 1979. And, it omits all activity at the trial courts.



> Mr. President, 17 years ago he murders teenagers, he murders an innocent family that is trying to help him out, and he is still on death row.

141 Cong. Rec. S7821 (June 7, 1995). *See* 141 Cong. Rec. S7833 (June 7, 1995) (recognizing delays in carrying out capital sentences of "16 or 17 years, with the average being over 9 years[,]" and stating, "The system is drastically broken.") (statement of Sen. Kyl).

In short, Congress viewed the record of the pre-AEDPA system as regrettable proof that "Justice delayed is justice denied." 142 Cong. Rec. S3359 (Apr. 16, 1996) (statement of Sen. Hatch).

### B. Prior to AEDPA, Challenges to Sentences Were Subject to Habeas Limitations Whether Such Challenges Were Labeled "§ 1983" or "Habeas."

Prior to Congress' 1996 enactment of AEDPA, this Court had occasion to address challenges to sentences by state prisoners who attempted to avoid the then-existing limitations on habeas petitions by labeling their claim a "§ 1983 claim." In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), three New York State prisoners attempted to avoid the exhaustion of state remedies requirement of the then-existing federal habeas statute by filing 42 U.S.C. § 1983 actions challenging their prison terms—their sentences. This Court stated:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. *It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings.* In short, Congress has determined that habeas corpus is the appropriate remedy

> for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

*Id.* at 489-90. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation . . .").

In *Gomez v. United States District Court*, 503 U.S. 653 (1992), a state prisoner, who had previously filed four federal habeas petitions, challenged his capital sentence by filing a § 1983 action claiming that the method of execution—lethal gas—was cruel and unusual punishment. The Court recognized:

> *This action is an obvious attempt to avoid the application of McCleskey v. Zant*, 499 U.S. 467 . . . (1991), [the then-existing limitation on habeas petitions] to *bar this successive claim for relief.*
>
> . . . .
>
> *Whether his claim is framed as a habeas petition or as a § 1983 action*, [the defendant] seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and [the prisoner's] obvious attempt at manipulation. . . . This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

*Id.* at 653-54 (emphases added).

In *Lonchar v. Thomas*, 517 U.S. 314, 318 (1996), a state prisoner under a capital sentence challenged the method of execution on the "hope that the State would change the execution method to lethal injection." The Eleventh Circuit vacated the stay of execution based on jurisprudential



concerns with delay rather than based on the then-existing habeas rules. This Court vacated the Eleventh Circuit's order, reasoning that the existing rules for habeas relief for state capital prisoners, and not jurisprudential creations, governed habeas petitions:

> These legal principles [limiting habeas relief] are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a *balancing of objectives (sometimes controversial), which is normally for Congress to make*, but which courts will make when Congress has not resolved the question.
>
> . . . .
>
> But the history of the Rule makes plain that the prejudice requirement represents a critical element in *the balancing of interests undertaken by Congress* and the framers of the Rule which courts may not undermine through the exercise of background equitable powers. *See Bank of Nova Scotia v. United States*, 487 U.S. 250 . . . (1988) ("The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power'") (quoting *United States v. Payner*, 447 U.S. 727, 736 . . . (1980)).
>
> Even in an area, such as exhaustion, where judges have considerable discretionary authority, appropriate *deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.*

*Lonchar*, 517 U.S. at 323, 327-28 (emphases added) (final quotations omitted).

Prior to the enactment of AEDPA, this Court made clear that a challenge to a sentence, whether labeled a "§ 1983 claim" or a "habeas petition," was subject to the limitations on habeas practice and that it was appropriate for the courts to defer to Congress in balancing the interests of the state prisoner with the interests of the States in comity and victims in finality and peace. Indeed, the Court took the unusual step of including an appendix in its opinion that noted that Congress had often proposed, but had not passed, further restrictions on habeas relief. *Lonchar*, 517 U.S. at 333–34. In the twenty-three days after the Court's April 1, 1996, opinion, however, Congress passed and President Clinton signed AEDPA that provided just such additional limitations on the relief that lower federal courts can provide to state prisoners.

## II. CONGRESS EXERCISED ITS CONSTITUTIONAL POWER TO PROHIBIT THE LOWER FEDERAL COURTS FROM GRANTING RELIEF TO STATE INMATES BASED ON "NEW FACTS" THAT DO NOT RELATE TO ACTUAL INNOCENCE.

Congress passed and President Clinton signed AEDPA to strike a new balance of interests to which this Court should defer in determining whether the lower federal courts can provide relief to state inmates. President Clinton stated:

> From now on criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences, and families of victims will no longer have to endure years of anguish and suffering.

*Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 Weekly Comp. Pres. Doc. 717, 718 (Apr. 24, 1996).

The President emphasized that the purpose of AEDPA was to "streamline Federal appeals for convicted criminals



sentenced to the death penalty." *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996).

Senator Grassley observed on the passage of the conference report of AEDPA:

> I believe that this conference report *strikes exactly the right balance on habeas corpus reform.* It provides enough in the way of habeas appeals to ensure that unjustly convicted people will have a fair and full opportunity to bring forth new evidence or contest their incarceration in numerous ways. But the conference report sets meaningful limits, which should go a long way toward eliminating many of the flagrant abuses that make a mockery of justice.

142 Cong. Rec. S3379 (April 16, 1996) (emphasis added).

### A. Congress Intended to Limit Relief Based on "New Facts" Claims That Do Not Relate to Actual Innocence.

In striking the balance invited by *Lonchar* and accomplished by AEDPA, Congress specifically addressed second or successive habeas petitions to the lower federal courts that are based on alleged new facts. To limit such challenges to convictions and sentences, Congress amended the statutory habeas provisions to state:

> (2) A claim presented in a *second or successive habeas corpus application* under section 2254 that was not presented in a prior application *shall be dismissed unless*—
>
> . . . .
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) *the facts underlying the claim*, if proven and viewed in light of the evidence as a whole, would be sufficient to *establish* by clear and convincing evidence that, but for constitutional error, *no reasonable factfinder would have found the applicant guilty* of the underlying offense.[15]

28 U.S.C. § 2244(b)(2)(B) (emphases added).[16]

While Congress did not preclude review of successive federal claims by this Court through the original writ, *see Felker v. Turpin*, 518 U.S. 651, 664-65 (1996), or via certiorari after review by state courts under 28 U.S.C. § 1257, Congress did preclude by statute the power of the lower federal courts to grant relief on successive challenges to sentences based on "new facts" that do not demonstrate actual innocence. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (stating that "the power to award the writ by any of the courts of the United States, must be given by written law"); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (recognizing "AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence"). So written, § 2244(b)(2)(B) represents the "balancing of interests under-

---

[15] As one of Nelson's own lawyers has correctly summarized, prior to AEDPA's amendment of § 2244, "any type of claim that was unavailable at the time of the earlier filing—because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner—was an appropriate candidate for inclusion in a successive petition." Stevenson, *supra*, n.11, at 736. "AEDPA's successive petition standard appears to incorporate this general approach, with one major difference." *Id.* at 737. "Subsection 2244(b)(2)(B)(ii) sharply diverges from prior law . . . by modifying the 'new facts' category to include an additional requirement that the petitioner make a showing of 'innocence.'" *Id.* at 737-38.

[16] Section 2244(b)(2)(A) provides that a second or successive habeas petition may also be based on a "new rule of constitutional law," but Petitioner does not assert such a rule is applicable to this case.



taken by Congress . . . which courts may not undermine through the exercise of background equitable powers." *Lonchar*, 517 U.S. at 327. In upholding AEDPA in *Felker*, 518 U.S. at 664, this Court again specifically recognized "that judgments about the proper scope of the writ are normally for Congress to make.'" (quoting *Lonchar*, 517 U.S. at 323).

Petitioner, who has previously filed two habeas petitions with the federal courts, belatedly challenged the lethal injection procedure adopted in 2002. While the procedure is a new fact, it raises no issue as to Nelson's actual guilt of the 1978 murder of Wilson Thompson, as his counsel has admitted. App. 70. Section 2244 thus commands that the claim "shall be dismissed."

### B. Allowing State Inmates to Evade Congress' Limitation on Successive Challenges to Sentences Based on Labels Would Undermine Congress' Constitutional Power.

As did the prisoners in *Preiser*, 411 U.S. at 489-90, and *Gomez*, 503 U.S. at 653–54, Petitioner seeks to avoid the limitation on his latest challenge to his sentence by labeling it a "§ 1983 claim." As this Court recognized prior to Congress' enactment of AEDPA:

> *It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings.*

*Preiser*, 411 U.S. at 489-90 (emphasis added).

Moreover, the delay Petitioner has accomplished is not fourteen, eighteen, or twenty years, but over twenty-five years. This is not his first or second challenge to his conviction or sentence in federal court, but his third. *See Nelson*, 292 F.3d at 1294; *Nelson*, 995 F.2d at 1549. This "new facts" claim does not challenge Petitioner's actual guilt of his third murder, but only that his choice of lethal injection might

require, unremarkably, an injection under a method recognized by standard medical textbooks, accomplished with anesthetic, and used on a President of the United States and on newborn infants over the last forty years.[17] This is precisely the type of claim that Congress sought to bar by enacting AEDPA and by so providing in the plain text of § 2244.

Allowing state prisoners to evade the specific limitation set forth in § 2244 by putting a "§ 1983" label on their claims would undermine the power of Congress to establish and to limit the jurisdiction of the lower federal courts. This Court should defer to the balance that Congress struck between providing redundant federal review to state capital defendants, on the one hand, and showing comity to the States and providing finality and peace to the victims' families, on the other.

## CONCLUSION

For these reasons and those contained in Respondents' brief, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

ED R. HADEN *
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201-0306
(205) 251-8100

* Counsel of Record

Counsel for *Amici Curiae*

March 3, 2004

---

[17] *See* Warren Commission Report, *supra* note 10, at 929; Clinical Procedures in Emergency Medicine, *supra* note 10, at 350; Vascular Access: Principles and Practice, *supra* note 9, at 251–52; Journal of Pediatric Surgery, *supra* note 9, at 343.